IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.290 OF 2003

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The New India Assurance Company Ltd. ...Petitioners

v/s.

Jayesh Engineering Works ...Respondents

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Mr.C.S.Balsara i/b Negandhi Shah & Himayatullah for the Petitioners.

Mr.Milind Vasudeo i/b Ms.B.N. Dalal for the Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 23RD FEBRUARY,2005

P.C.:

1. By this Petition, the Petitioners raise an objection to the award made by the arbitral tribunal dated 9th October, 2005 directing the Petitioners to make certain payments to the Respondents.

2. The Petitioners are a company carrying on business of insurance, while Respondent is a partnership firm engaged in the work of construction. On April 7, 1981 the Petitioners and Respondent entered into an agreement, whereby Respondent undertook the work of construction of additional floors on 13 existing buildings at Juhu Lane, Andheri (West), Bombay. The work was to be carried out under the supervision of M/s.M.K. Talpade & Associates, Architects and Engineers. The Agreements were in fact two separate agreements, both of the same date is respect of 13 buildings and titled as Tender No.1 and Tender No.2. The work was to commence on January 15, 1981 and was to be completed by April 14, 1982. Clause 37 of the conditions of contract provided arbitration. The clause, inter alia, provided that

all disputes must be referred to be settled by the Architect who must state their decision in writing, within 28 days of the decision of the Architect, the party aggrieved must give notice to the other party requiring that the matter in dispute be referred to arbitration. The work was completed in the month of September, 1983 after the extension was granted.

3. On May 29, 1980 the Respondent submitted a final bill to the Architects, but the architects did not certify the bill for a considerable time and thereupon on February 6, 1987 the Respondent addressed letter to the Petitioners claiming difference of claims made in the letter to the arbitrators. The Architects certified the final bill in respect of Tender No.1 and Tender No.2 on June 1, 1988 and June 6, 1988 respectively. In accordance with the certification of the final bill, the Respondent was entitled to recover the amount. The Petitioners could not pay the said amount, because on October 5, 1987 the Income-tax authorities served notice under Section 226(3) of the Income-tax Act, 1961 upon the Petitioners restraining them from paying amount to the extent of Rs.6,74,000/- to the Respondent. The order of restraint issued by

Income-tax authorities was brought to the attention of Respondent. The Petitioners thereafter informed the Respondent that out of the amount of final bill certified by the architects the Petitioners are entitled to deduct certain amount in respect of recoveries made and which have been provided under the agreement. The Petitioners informed the Respondent by letter dated August 18, 1986 about such deductions. The Petitioners further informed, after making deductions, the balance amount would be paid to the Respondent after the order of restraint by Income-tax authorities was withdrawn. The order of restraint was raised by the Income-tax authorities in November 26, 1988.

4. On December 8, 1986 the Respondent informed the Petitioners that the Respondent accepts the recoveries made by the Petitioners and the deductions effected from the amounts due to the Respondent under the final bill. The Respondent requested that the balance amount after deductions should be released and payment should be made forthwith. The Petitioners thereafter addressed a letter dated February 6, 1989 informing the Respondent that the final amount certified by the Architects was to the

tune of Rs.50,88,028/- and the deductions which the Petitioners are entitled to make are to the tune of Rs.10,85,524/-. After taking into consideration various amounts paid to the Respondent from time to time, the balance due was Rs.2,79,600/- only. The letter recites that cheque for the said amount in final settlement of tender Nos.1 and 2 is enclosed. On receipt of the letter the partner of the Respondent No.1 has made an endorsement to the following effect:-

"Received original letter and cheque no. 000764 dated February 16, 1989 drawn on Central Bank on amounting to Rs.2,79,600/- was full and final payment against Tender No.1 and Tender No.2. We do not have any further claims in this respect."

After receipt of the payment, the Respondent turned round and by letter dated February 21, 1989 informed the petitioners that the acknowledgement of receipt of cheque in full and final settlement was made under coercion. The Respondent also claimed that the amount as claimed by letter dated February 6, 1987 is still outstanding and the Petitioners should pay the said amount forthwith or the dispute will be referred

to arbitration. The Petitioners declined to entertain any such claim.

5. Thereafter the arbitral tribunal was constituted and the disputes were referred to the arbitral tribunal. It appears that Arbitration Petition No.126 of 1989 was filed in this Court by the Petitioners claiming that because of the receipt signed by the Respondent, the arbitration clause does not survive. That Petition was decided by order dated 9th August, 1989. This court accepted the contention of the Petitioners and held that because of the receipt the arbitration clause does not survive. The order dated 19th August, 1989 passed by this Court was challenged before the Supreme Court in Civil Appeal No.4166 of 1989. That Appeal came to be decided by the Supreme Court by order dated 11-3-1999. The Supreme Court held that the question whether the arbitration clause survives because of the receipt referred to above ought not have been decided by this Court and should have left to be decided by the arbitral tribunal. Therefore, the Supreme Court set aside the order passed by this court. Thus, the proceedings before the arbitral

tribunal commenced. Before the arbitral tribunal it appears that two preliminary objections were raised. One was that because of the receipt referred to above the Petitioners cannot agitate any claim in relation to tenders Nos. 1 & 2. Second objection was that as per clause 37 reference to arbitration has to be made within a period of 28 days of the final bill and in this case admittedly the reference has not been made within a period of 28 days from the date of issuance of final bill by the Architects, and therefore, reference to the arbitral tribunal is barred by the law of limitation. Both these preliminary objections have been decided by the arbitral tribunal by its award.

6. So far as the first question is concerned, the arbitral tribunal held that the receipt was signed by the Respondent under duress and therefore, it will not debar the Respondent from raising the dispute. So far as the point of limitation is concerned, the arbitral tribunal has held that because the arbitrator did not decide all the disputes that were raised before him by the Respondent, the final certificate issued by the Architect does not amount to final certificate and therefore the period of

limitation of 28 days is not applicable.

7. The learned Counsel appearing for the Petitioners submits that the Respondent has clearly stated that he is accepting the payment as full and final payment against the tenders Nos. 1 & 2 and that he does not have any further claim in this respect. It is submitted that the cheque representing the payment as per the final bill of the Architects was issued because the Respondent himself addressed a letter dated 26th November, 1988 requesting the Petitioners to release the payment as per the certificate issued by the Architects for both tenders Nos. 1 & 2. It is submitted that even assuming that the Petitioners have stated that they will make the payment only if the Respondent is willing to accept the payment as full and final payment, it will not amount to any coercion. The Respondent was free to say that he is not willing to accept the payment as full and final payment. According to the learned Counsel a finding in this regard recorded by the arbitrators is perverse.

8. On the other hand, on behalf of the Respondent it is contended that the work was completed in the year

1983, the payment was not made for a very long time, ultimately when the payment was offered the Respondent was helpless, so he has accepted the condition that was put by the Petitioners to accept the payment and therefore the endorsement made and the receipt signed by the Respondent will not stop the Respondent from raising the claim.

9. So far as the question of limitation is concerned, on behalf of the Petitioners it is submitted that the finding recorded by the arbitral tribunal that because the architect did not record a decision on some of the items which were put before him by the Respondent, the final certificate issued by the architect does not amount to a final certificate is a perverse finding. It is submitted that even if it is assumed that some disputes were not decided by the architects, still it will not deprive the final certificate of its status as a final certificate for the purpose of calculating the period of limitation. It is submitted that for the purpose of raising disputes in relation to items with regard to which there is a decision contained in the final certificate as also the questions which have remained undecided by the architect, the starting

point of limitation would be the date of the final certificate. It is submitted that the dispute has to be raised within a period of 28 days from the date of final certificate.

10. On behalf of the Respondent, on the other hand, it is submitted by referring to the phraseology used in clause 37 that the limitation for raising the disputes in relation to points which have been decided by the architects in his final bill, is 28 days. However, so far as the question in relation to which there is no decision recorded by the architect is concerned, the period of limitation would be governed by the provisions of the Limitation Act. It was also urged relying on the judgment of the Division Bench of this Court in the case of New Consolidated Construction Co.Ltd. v/s. Glaxo Laboratories (India) Ltd. 1976 Bombay Law Reporter, Vol.LXXVIII, 441 that the clause providing 28 days as limitation for raising dispute is not mandatory but is directory. Relying on the judgment of the Supreme Court in the case of Union of India and anr. v/s. M/s.L.K. Ahuja and Co., AIR 1988 SC 1172, it was also contended that even after settlement of final bill, the right of the party to get further payment

survives, though it may get weakened.

10A. Perusal of the record reveals that final certificates were issued by the architect in the month of June, 1988. The Petitioners addressed a letter dated 27th June, 1988 to the Respondent informing that final certificates have been received by the Petitioners and that the final bill is being scrutinised. It was stated in the letter that a notice has been received from the Income-tax Department, as a result of which payment of the amount of final bill cannot be made to the Respondent. It appears that thereafter the Income-tax Department lifted the embargo. Ultimately the Respondent addressed a letter dated 26-11-1988. This was with reference to the letter of the Petitioners dated 27-6-1988. That letter reads as under:-

> With reference to your letter No.Estate:137:88 dated 27-6-88 we have to inform you that we have obtained necessary clearance from Income-tax department and the said department had withdrawn their notice under Section 226(3) a copy of the

said withdrawal is enclosed herewith for your record.

Now, you are requested to release our payment as per the certificate issued by your architect M/s.M.K.Talpade & Associates for both the tenders No.I & II at the earliest and oblige.

11. Perusal of the letter dated 27-6-1988 shows that the Petitioners had clearly told the Respondent that the final certificates have been issued by the architect and the final bill is being scrutinised. Perusal of the letter dated 18th August, 1988 which was written by the Petitioners to the Respondent shows that Mr.Tijoriwala of the Respondent had visited the office of the Petitioners on 27-6-1988 and that he had promised to send the accountant to discuss and confirm the recoveries which were to be made from the final bill by the Petitioners. It is, thus, clear that the Respondent was clearly aware of the final certificate issued by the architect, in any case by 27-6-1988. It is also clear that till 26-11-1988 the Respondent was not in a position to

receive the payment because of the order made by the Income-tax department. Therefore, in case the Respondent was dissatisfied with the final certificate issued by the architect, he could have referred the dispute to the arbitrator, in any case within a period of 28 days from 27-6-1988. But from the correspondence that is placed on record it appears that the Respondent was not even contemplating at that time raising any dispute in relation to the final certificate. Ultimately on 26-11-1988 he wrote a letter, contents of which are quoted above, requesting the Petitioners to release the payment as per the final certificate. Perusal of the letter dated 8-12-1988 written by the Respondent to the Petitioners shows that he has given his concurrence for the recovery that was to be made by the Petitioners from the final bill. In this background the receipt signed by the Petitioners dated 15-2-1989 is to be seen. That receipt is admittedly signed by the Respondent and it reads as under:-

> Received original letter and cheque No.000764 dt: 16.2.89 amounting to Rs.2,79,600.00 as full and final payment

against Tender No.I and Tender No.II. We do not have any further claims in this respect on Central Bank.

12. The only defence in relation to this receipt raised by the Respondent was that this receipt was signed under duress and compulsion and the duress and compulsion according to the Respondent was that the Petitioner was not ready to release the payment unless the Respondent signed the receipt. In my opinion, even assuming that the Petitioners were not ready to release the payment unless the Respondent is willing to accept it as full and final payment it will not amount to any coercion or compulsion. It was open to the Respondent to write to the Petitioners that the Petitioners were not justified in putting that condition and that the Respondent is willing to accept the amount without prejudice to his rights and contentions. The correspondence that is on record exchanged between the parties shows that till 16-2-1989, the date on which the final receipt has been signed, the Respondent was not even disputing the final certificates and even contemplating making any reference to the

arbitration. Perusal of the award shows that the arbitrators have observed thus:

> "The entire body i.e.contents of this letter do not contain word about the claims of Claimants and talks about "full and final settlement" in last but one para. Yet the Claimants have signed receipt of no further claim in "this respect". This itself shows that claims arising out of contract are not included in this receipt since the final certificate is only for 13th bill and it is completely silent on Claimants claims. This appears to be the receipt given under duress it can not be termed as "satisfaction and accord" in the given circumstances of the case where in the payments are held up for more than 5 years. Admittedly it the case of a small contractor against the big corporation. The weaker party will be at further dis-advantage because without such a receipt even this payment would not given unless the Claimants signed on dotted line. We therefore hold that the Claimants have

> given the receipt under duress and it does not amount to "Accord and satisfaction" as far as Claimants claims are concerned."

In my opinion, the finding is perverse. The arbitral tribunal has held that the receipt relates to only 13th bill and not the payment under tenders Nos. 1 & 2, whereas the receipt in terms says that the amount represents full and final settlement against tenders Nos. 1 & 2. In my opinion, therefore, the finding of the arbitral tribunal in this regard is perverse and is liable to be set aside.

13. So far as question of limitation is concerned, one has to refer to clause 37 first. Clause 37 reads as under:-

> 37. All disputes and difference of any kind whatever arising out of or in connection with the contract or the carrying out of the works (whether during the progress of the works or after completion, and whether before or after the

determination, abandonment or breach of the Contract) shall be referred to and settled by the Architect who shall state their decision in writing. Such decision may be in the form of a final certificate or otherwise. The decision of the Architect with respect to any of the excepted matters shall be final and without Appeal as stated in Clause No.35. But if either the Employer or the Contractor be dissatisfied with the decision of the Architects or any matter question of the dispute of any kind (except any of the excepted matters) or as to the withholding by the Architects of any certificate to which the Contractor may claim to be entitled, then and in any such case either party (the Employer or the Contractor) may with twenty eight days after receiving notice to such decision give a written notice to the other party through the Architects requiring that such matters in dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute and such disputes or differences of which such

written notice has been given and no other shall be and is hereby referred to the arbitration and final decision of a single Arbitrator being Fellow of the Indian Institute of Architects to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single Arbitrator, to the arbitration of two Arbitrators being both Fellows of the Indian Institute of Architects one to be appointed by each party, which Arbitrators shall before taking upon themselves the burden of Reference an Umpire.

The Arbitrator, the Arbitrators or the Umpire shall have to open up review and revise any certificate, opinion, requisition, or notice, save in regard to the excepted matters referred to in Clause No.35 and to determine all matters in dispute which shall be submitted to him or them and of which notice shall have been given as aforesaid.

Upon every or any such reference the cost of and incidental to the Reference and Award respectively shall be in the direction of the Architects, or Arbitrators or the Umpire who may determine the amount thereof, or direct the same to be taxed as between Attorney and Client or as between party and party and shall direct by whom and to whom and in what manner the same shall be born and paid. This submission shall be deemed to be a submission to Arbitration within the meaning of the Indian Arbitrator Act 1899 or any statutory modification thereof. The award of the Arbitrator or Arbitrators or the Umpire shall be final and binding on the parties. Such reference expect as to the withholding by the Architects of any Certificates under clause 32 to which the Contractor claims to be entitled, shall not be opened or entered upon until after the completion or alleged completion of the works or until after the practical cessation of the works arising from any cause unless with the written consent of the Employer and the Contractor.

> Provided always that the Employer shall not withhold the payment of the interim Certificate nor the Contractor expect with the consent in writing of the Architects in any way delay the carrying out of the works by reason of any such matter, question, or dispute being referred to Arbitration but shall proceed with work with all due diligence and shall until the decision of the Arbitrator or Arbitrators or the Umpire be given abide by the decision of the Architects and no Award of the Arbitrator or the Arbitrators or the Umpire shall relieve the contractor of his obligations to adhere strictly to the Architects' Instructions with regard to the actual carrying out of the works. The Employer and the Contractor hereby also agree that Arbitration under this clause shall be a condition precedent to any right of Action under the Contract.

14. Perusal of this clause shows that the scheme of clause is that all disputes arising between the

parties are to be first placed before the architect. The architect has to decide these disputes in the final certificate or even otherwise. But once the architect issues the final certificate, if the parties are dissatisfied about the decision contained in the final certificate or if the architect has left any dispute undecided while issuing the final certificate, then if any of the parties desire to refere the disputes to arbitration, it has to be made within a period of 28 days. If any other meaning is attached to this clause, it will mean that in so far as the dispute, with regard to which decision is contained in the final certificate, the period of limitation is 28 days. However, so far as those disputes which remain undecided, the period of limitation would be governed by the Limitation Act. In my opinion, this will not be a happy situation. The correct interpretation of clause 37 would be that parties have to raise all disputes before the architect. The architect has to decide the dispute in his final certificate. After the final certificate is issued, the architect loses the power to decide any dispute and therefore if the parties are dissatisfied with the decision of the architect or because of the

conduct of the architect of not recording any decision on some of the disputes, the parties have to invoke the arbitration clause within 28 days of the final certificate. Different period of limitation in relation to the same dispute cannot be allowed and admitting two different period of limitation would lead to uncertainty and would not be in the interest of justice. Perusal of the award, however, shows that the arbitrators have held that because some of the disputes were not decided in the final certificate, the final certificates issued by the architect do not amount to final certificates. In my opinion, this reason is unacceptable, because the arbitration clause itself contemplates the architect leaving some disputes undecided and provides forum of arbitration for these disputes also. Because there is no decision recorded on some of the disputes in the final certificate will not deprive the final certificate of the status of the final certificate. It will have to be treated as final certificate for the purpose of limitation. Second aspect that has not been considered by the arbitral tribunal is that, if the final certificates issued by the architect are not to be considered as final certificate, then the

arbitral tribunal may not have the jurisdiction to entertain the reference because reference to arbitration can be made only after the final certificate is issued by the architect. If there is no final certificate issued by the architect, the arbitral tribunal gets no jurisdiction. In my opinion, therefore, the finding recorded by the arbitral tribunal in this regard is also unsustainable. In my opinion, the arbitral tribunal should have upheld both the preliminary objections of the Petitioners. As I find that the award of the arbitral tribunal is liable to be set aside, because the arbitral tribunal has no jurisdiction to entertain the dispute, firstly, because of the receipt signed by the Respondent and secondly because the reference was made beyond the period of limitation, the award , in my opinion, is liable to be set aside and therefore, I do not propose to consider the contentions on merits of the claim made by the Respondent.

15. So far contention that the period of 28 days is not mandatory is concerned, this question was not raised at any point of time before the arbitrator, it is also not raised in the affidavit in reply

filed in this petition, therefore, it cannot be permitted to be raised for the first time at the hearing of the petition.

16. In the result, the petition succeeds and is allowed. The award impugned in the petition is set aside.

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